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CPLR 4102(a): Withdrawal of Jury Demand Permissable Without Opposition's Consent in Absence of Reliance

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> statute [of limitations], is to be expected of any court cognizant of the nature of the problem.[167]

Nothwithstanding this sound advice, it is patently clear that one cannot anticipate this specific reaction from any given court, particularly since the validity of *Seider* attachments in other states is at best questionable. Furthermore, the court is assuming that the foreign forum has a statutory provision similar to CPLR 3211(a)(4) and, that if it does, it will construe it as we construe that section. Upon reflection, perhaps the best advice offered by the court is to have the plaintiff sue originally where he can get in personam jurisdiction over the defendant. This assumes, of course, that the defendant has assets in another jurisdiction over and above the insurance policy coverage which could be attached in a New York *Seider*-based action. However, if there are no other assets or if the judgment sought in New York will not exceed the policy limits, there is no need for the second action. And using the quasi in rem *Seider*-based action initially, a New York resident plaintiff receives the benefit of a New York jury and the exceptionally large verdicts for which they are notorious.

Article 41 — Trial by Jury

CPLR 4102(a): Withdrawal of jury demand permissible without opposition's consent in absence of reliance.

A party to a civil action must assert his right to a jury trial by including an appropriate demand in his note of issue at the time it is filed.[168] If none of the parties makes such a demand pursuant to CPLR 4102(a), the right will be deemed waived by all. However, once either party so reserves his right to a jury trial, it is unnecessary for the opponent to assert the right on his own behalf since "[a] party may not withdraw a demand for trial by jury without the consent of the other parties."[169] Thus, if a demand has been made by one party, the other may rely upon it as if he had made it in the first instance.[170]

In *Downing v. Downing*,[171] the first department found it necessary to examine the purpose behind 4102(a)'s stipulation that all parties

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167 59 Misc. 2d at 673, 299 N.Y.S.2d at 945.

168 CPLR 4102(a). The party must also serve all other parties with his demand. Any party served a note of issue not including a demand for a trial by jury may demand such, by serving every party with demand, and filing the demand within fifteen days. *Id.*

169 CPLR 4102(a).

170 Schnur v. Gajewski, 207 Misc. 637, 140 N.Y.S.2d 82 (Sup. Ct. Bronx County 1955) (assent of all parties must be obtained before demand for jury trial may be withdrawn by plaintiff since court is unable to speculate whether or not objecting defendant would have independently demanded this right).

171 32 App. Div. 2d 350, 302 N.Y.S.2d 334 (1st Dep't 1969).

must assent before a jury demand can be withdrawn. The majority found that the provision is meant "to protect the party who *in reliance on his opponent's* demand for a jury trial properly fails to make demand in his own note of issue."[172]

Since a note of issue must be filed in order to place a case on the court's calendar,[173] it is usually the plaintiff who files first. In *Downing*, however, it was the defendant who did so, and no demand for a jury trial was included in his note of issue. Plaintiff subsequently demanded a jury trial, and the controversy arose when the defendant objected to plaintiff's motion to withdraw her jury demand. Despite 4102(a)'s apparent prohibition of such unilateral action, the motion was granted. The appellate division affirmed trial term's order, reasoning that the defendant could not have been in a position to object to plaintiff's subsequent withdrawal of her demand since, in light of the fact that he filed his note of issue first without making a demand, it was logically impossible for him to contend that he relied upon her demand to safeguard his right to a jury trial. The court noted that the defendant was in no way prejudiced because the same result would have been achieved if the plaintiff had not subsequently demanded a jury trial.

In opposition to the majority's position, and in reliance upon two earlier decisions,[174] the dissent called for strict interpretation of the statute. However, the two cases cited by the dissent are readily distinguishable in that the defendants in those cases were not first to file the note of issue. Instead, they relied upon the plaintiffs' demands for a jury trial.

Furthermore, the dissent's concern over the possibility that the defendant had been forced to expend much effort and undergo great expense in preparation for a jury trial is equally meretricious. If such were indeed the case, the court, in its discretion, could have granted a jury trial pursuant to subsections (d) and (e) of CPLR 4102 without interpreting subsection (a) in the literal sense suggested by the dissent.

CPLR 4112: Proper time to request jury poll in a two-stage trial held to be at conclusion of second stage.

The right of the nonprevailing party to poll the jury[175] after a verdict has been rendered is deeply entrenched in the common law of

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172 *Id.* at 351, 302 N.Y.S.2d at 336 (emphasis added).

173 CPLR 3402(a).

174 Schnur v. Gajewski, 207 Misc. 637, 140 N.Y.S.2d 82 (Sup. Ct. Bronx County 1955); Huntsberry v. Millers Mut. Fire Ins. Co., 199 So. 2d 196 (La. App. 3d Cir. 1967).

175 One object of polling the jury is to ascertain whether the jurors in fact agree with the rendered verdict and to insure that no juror has had a change of mind before entry of the decision in the minutes of the court. *See* Labor v. Koplin, 4 N.Y. 547 (1851).